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In The

Supreme Court of the United States

October Term, 1990

SHIRLEY M. MOLZOF, as personal representative of the Estate of ROBERT E. MOLZOF,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY BRIEF OF PETITIONER

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ARGUMENT

I. THE TERM "PUNITIVE DAMAGES" AS USED IN 28 U.S.C. §2674 MUST BE INTERPRETED IN ACCORDANCE WITH TRADITIONAL TORT PRINCIPLES TO MEAN THOSE DAMAGES WHICH ARE BASED ON THE CULPABILITY OF THE TORTFEASOR'S CONDUCT AND ARE INTENDED TO ACT AS PUNISHMENT FOR THAT CONDUCT.

A. The Fact That The Interpretation Of The Prohibition Of "Punitive Damages" In 28 U.S.C. §2674 Is A Matter Of Federal Law Does Not Preclude The Court From Taking Into Consideration The Traditional Tort Concept Of Punitive Damages.

The respondent mischaracterizes the petitioner's interpretation of the prohibition of "punitive damages" in 28 U.S.C. §2674 as being "a variable standard that changes depending on the law of the State where the claim arises." Resp. Br. 7. To the contrary, it is the position of the petitioner that the term "punitive damages" should be interpreted in accordance with the traditional tort view of punitive damages as being those damages which are based on the culpability of the tortfeasor's conduct and which are meant to punish the tortfeasor for that conduct. This interpretation of "punitive damages" would not vary in accordance with state law, but would be uniform in each case.

The petitioner realizes that the interpretation of the term "punitive damages" is a matter of federal law. However, that fact does not preclude the Court from considering traditional tort law in interpreting that term. The respondent would have the Court believe that because

the interpretation of "punitive damages" has to be a uniform federal one, the Court must completely ignore traditional tort concepts and create a definition of "punitive damages" which is totally separate from, and even inconsistent with, traditional tort law. This is not necessary. It is perfectly proper for this Court to consider traditional tort concepts when interpreting a provision of the Federal Tort Claims Act, *United States v. Orleans*, 425 U.S. 807 (1976); *Logue v. United States*, 412 U.S. 521 (1973); *United States v. Neustadt*, 366 U.S. 696 (1961); *Williams v. United States*, 350 U.S. 857 (1955), and it is perfectly proper for the Court to assume that in prohibiting "punitive damages," Congress had a traditional tort definition in mind. *United States v. Neustadt*, 366 U.S. at 706-08.

Several courts of appeal have relied on traditional tort principles in interpreting the prohibition against "punitive damages." *Rufino v. United States*, 829 F.2d 354, 362 (2nd Cir. 1987); *Kalavity v. United States*, 584 F.2d 809, 811 (6th Cir. 1978) ("In excluding 'punitive' damages from the coverage of the Tort Claims Act, we believe that Congress simply prohibited use of a retributive theory of punishment against the government, not a theory of damages which would exclude all customary damages awarded under traditional tort law principles which mix theories of compensation and deterrence together."); *Manko v. United States*, 830 F.2d 831, 836 (8th Cir. 1987) ("We conclude that Congress did not mean to outlaw all variations from some ideal norm of compensation when it forbade 'punitive damages.' It was referring only to that concept in its traditional sense.") See also: *Shaw v. United States*, 741 F.2d 1202, 1208 (9th Cir. 1984); *Yako v. United States*, 891 F.2d 738, 747 (9th Cir. 1989).

The respondent even acknowledges in a footnote that in *United States v. Neustadt, supra,* this Court relied on general principles of tort law as an aid in determining the appropriate federal definition of "misrepresentation" for purposes of 28 U.S.C. §2680(h). Resp. Br. 11, fn. 4. The petitioner is only asking the Court to do the same here.

B. The Traditional View Of Punitive Damages Is That They Are Damages Which Are Based On The Culpability Of The Tortfeasor's Conduct And Are Intended To Act As Punishment For That Conduct.

The respondent argues that if the Court were to accept the traditional tort concept of punitive damages as a definition of "punitive damages" for the purpose of 28 U.S.C. §2674, this would not result in an acceptance of the petitioner's position, because punitive damages were traditionally considered those damages which were in excess of compensation. Resp. Br. 13-16. It is the respondent, however, not the petitioner, who has misunderstood the traditional concept of punitive damages.

Punitive damages have always been viewed as those damages which are awarded as punishment for the culpability of the tortfeasor's conduct. Contrary to the respondent's statement on page 15 of its brief, an award of punitive damages was not merely "accompanied" by an evaluation of the severity of the tortfeasor's wrongdoing, but rather, a *necessary prerequisite* of an award of punitive damages was that the tortfeasor's conduct must have been outrageous, malicious or actuated by ill will. Because punitive damages are awarded for the purpose of punishing the tortfeasor for egregious conduct, they

are necessarily non-compensatory. Because punitive damages are awarded only after compensatory damages are awarded, they obviously exceed the amount necessary to compensate the claimant. However, the mere fact that punitive damages exceed compensatory damages does not mean that punitive damages are *any* damages which are in excess of compensation. Punitive damages are those damages which are awarded only when it has been shown that the tortfeasor's conduct is deserving of punishment.

Even the authorities which respondent quotes in footnote 7 of its brief state that punitive damages are dependent upon the aggravative nature of the tortfeasor's conduct and are awarded to punish that conduct.

> Where the defendant's wrongdoing has been intentional and deliberate, and has the character of outrage frequently associated with crime, all but a few courts have permitted the jury to award in the tort action "punitive" or "exemplary" damages, or what is sometimes called "smart money." Such damages are given to the plaintiff over and above the full compensation for his injuries, for the purpose of punishing the defendant, of teaching him not to do it again, and of deterring others from following his example. *Something more than the mere commission of a tort is always required for punitive damages: there must be circumstances of aggravation or outrage, such as ill will or a fraudulent or evil motive on the part of the defendant, or such a conscious and deliberate disregard of the interests of others that his conduct may be called wilful or wanton.* . . . [I]t is not so much the particular tort

> committed as the defendant's motives and conduct in committing it which will be important as the basis of the award.

(Emphasis supplied.) W. Prosser, *Handbook of the Law of Torts*, §2, pp. 11-14 (1941).

> In the case of most torts, ill will, evil motive, or consciousness of wrongdoing on the part of the tort-feasor are not at all essential to render the conduct actionable; that is, to render him responsible for damages, actual or nominal. . . . As to the recovery of exemplary damages, however, the situation is quite different, and it is this difference that constitutes the most important distinctive feature of this kind of damages. Since these damages are assessed for punishment and not for reparation, *a positive element of conscious wrongdoing is always required*. It must be shown either that the defendant was actuated by ill will, malice, or evil motive. . . . , or by fraudulent purposes, or that he was so wanton and reckless as to evince a conscious disregard of the rights of others.

(Emphasis supplied.) C. McCormick, *Handbook on the Law of Damages*, §79, p. 280 (1935).

> In actions of trespass, where the injury has been wanton and malicious, or gross and outrageous, the courts permit juries to add to the measured compensation of the plaintiff which he would have been entitled to recover, had the injury been inflicted without design or intention, something further by way of punishment or example, which has sometimes been called "smart money." This has always been left to the discretion of the jury, as the degree of punishment to be thus inflicted must depend on the peculiar circumstances of each case. [The punishment of his delinquency] depends upon the

> degree of malice, wantonness, oppression, or outrage of the defendant's conduct.

Day v. Woodworth, 13 How. 363, 371 (1852).

> Redress commensurate to such [personal] injuries should be afforded. In ascertaining its extent, the jury may consider all the facts which relate to the wrongful act of the defendant, and its consequences to the plaintiff; but they are not at liberty to go farther, unless it was done wilfully, or was the result of that reckless indifference to the rights of others which is equivalent to an intentional violation of them. In that case, the jury are authorized, for the sake of public example, to give such additional damages as the circumstances require. The tort is aggravated by the evil motive, and on this rests the rule of exemplary damages.

Milwaukee & St. Paul Railway Co. v. Arms, 91 U.S. 489, 493 (1875).

See also: Restatement of Torts, §908 (1939) ("Punitive damages are awarded only for outrageous conduct, that is, for acts done with a bad motive or with a reckless indifference to the interests of others.")

Although punitive damages do, by their very nature, exceed the amount necessary to compensate a claimant, punitive damages are not *any* damages in excess of compensation. Punitive damages require egregious conduct and they are assessed solely for the purpose of punishing that conduct.

C. Interpretation Of The Term "Punitive Damages" In Accordance With Traditional Tort Principles Is Not Inconsistent With The Compensatory Purpose Of The Tort Claims Act.

The respondent relies heavily on the fact that the purpose of the Tort Claims Act is compensation.

However, the fact that the Act was intended to compensate federal tort claimants does not automatically lead to the conclusion that "punitive damages" are any damages in excess of compensation, regardless of whether they are labeled as compensatory damages under state law. Moreover, defining "punitive damages" as those damages intended to punish a tortfeasor for his egregious conduct is not inconsistent with this purpose. In enacting the Tort Claims Act, Congress simply intended to compensate claimants in accordance with state damage laws, and refused to allow awards of those damages which are not intended to act as compensation and are assessed solely on the basis of the degree of egregiousness of the tortfeasor's conduct.

D. The Seventh Circuit's Definition Of "Punitive Damages" Is Unworkable In Practice.

The respondent dismisses the petitioner's concerns about the unworkable nature of the Seventh Circuit's definition of "punitive damages" by claiming that the cases listed on pages 28-30 of the petitioner's brief, in which numerous types of damages were claimed to be "punitive," merely present three basic questions which are routine and can easily be answered. However, the respondent's attempt to simplify the application of the Seventh Circuit's definition fails to resolve the numerous problems which would be presented if this Court were to adopt the Seventh Circuit's definition.

The respondent believes that "punitive damages" should be defined as those in excess of the amount necessary to compensate the claimant. However, the

respondent fails to explain what it means by "compensate." If "punitive damages" are defined by federal law as those exceeding compensation, one would have to create a federal definition of "compensation." The state law definition of "compensatory damages" could not be used, because damages which are viewed under state law as being compensatory may be viewed under the respondent's definition as being, in fact, "punitive," because they exceed the amount necessary to compensate a claimant for his loss. Consequently, if the Court were to accept the respondent's definition of "punitive damages," the meaning of the word "compensate" would have to be redefined.

The respondent also fails to take into account the fact that acceptance of such a definition of "punitive damages" would result in assertions being made by the government in almost every case that the damages awarded under state law are "punitive". Because "punitive damages" would be defined as those in excess of the amount necessary to compensate the claimant, the government could always claim that any element of damages which is labeled by state law as being compensatory was actually "punitive" because it was not necessary to actually compensate the claimant. Assertions like this would continue to be made by the government until there developed an entire body of federal law defining exactly what types of damages could be recovered and the manner in which they are measured.

The respondent's contention that the implementation of the Seventh Circuit's definition of "punitive damages" would merely require the federal courts to resolve three

easily answered questions does not address these concerns. With respect to the first of these questions — whether the damages are excessive, the respondent contends that state law standards for the review of the excessiveness of damage awards will be sufficient to answer this question and thus implement the prohibition of "punitive damages." Resp. Br. 22. This statement is completely inconsistent with the respondent's position that state law or traditional tort law cannot be used to define "punitive damages." Moreover, the respondent fails to realize that in the numerous cases in which the government contended that an award of damages was "punitive," the award was one which state law considered to be compensatory, but the government claimed that state law should be ignored and the award viewed as "punitive" because it exceeded the amount necessary to compensate the claimant. If, in determining whether damages are "punitive," the government cannot accept a state's characterization of state law damages as being compensatory, then it is inconsistent for the government to now claim that a state's standards for determining the excessiveness of damages can be utilized in implementing the respondent's proposed definition of "punitive damages."

The second question which the respondent sees as being posed by the cases cited in the petitioner's brief is whether separate elements of damages are duplicative. The respondent asserts that this question generally only arises in cases concerning the deduction of federal income taxes from awards for lost future earnings and cases involving so-called collateral source payments by the government. The respondent asserts that this question can easily be handled merely by holding that federal

income taxes must be deducted from an award for lost future earnings and merely by determining whether the government is paying for more than the injuries it has caused.

The respondent has, however, underestimated the number of cases in which the government has claimed that damages are duplicative and therefore "punitive." This assertion has been made in more than just those cases involving deductions for federal income taxes and collateral source payments by the federal government. The government has contended, for example, that an award of damages for the value of the life of a decedent should be reduced by the amount of personal expenses the decedent would have incurred had he lived, *Hartz v. United States*, 415 F.2d 259, 264 (5th Cir. 1969). The list of cases on pages 28-30 of the petitioner's brief provides other examples of situations in which the government has claimed that damages were duplicative. Moreover, cases in which the government paid benefits to a claimant are not the only cases in which the government claimed that the collateral source rule did not apply. For instance, the government has claimed that a Tort Claims Act recovery should be reduced by the amount of worker's compensation benefits paid to a claimant, *Aretz v. United States*, 456 F.Supp. 397, 404-08 (S.D.Ga. 1978), affirmed, 604 F.2d 417 (5th Cir. 1979), and the government has claimed that funds provided to handicapped children by state and local governments should be deducted from a Tort Claims Act recovery, *Anderson v. United States*, 731 F.Supp. 391, 400-02 (D.N.D. 1990). If the Court were to accept the

Seventh Circuit's definition of "punitive damages," similar contentions would continue to be made by the government.

It is interesting to note that the respondent states that it does not claim that tort judgments against the United States should be reduced by the amount of benefits received by tort claimants from truly collateral sources. The petitioner submits, however, and the *Aretz* and *Anderson* cases are proof of this fact, that such an argument would be made at some point in time by the government, because allowing a claimant to receive both collateral source benefits and a tort judgment from the government for the same injuries would, according to the Seventh Circuit's definition, be "punitive" because the claimant would receive a recovery exceeding the amount necessary to compensate him or her.

The respondent claims that the third question raised by the petitioner's list of cases — whether damages are awarded for an inherently non-compensable loss -- will not arise frequently. To the contrary, however, the petitioner's list of cases evidences the fact that it has arisen frequently. The government has argued, for instance, that a plaintiff with cognitive ability may not recover damages for loss of enjoyment of life, *Burke v. United States*, 605 F.Supp. 981, 991-92 (D.Md. 1985); that a brain-damaged child may not recover damages for pain and suffering, *Shaw v. United States*, 741 F.2d at 1208; that a brain-damaged child may not recover damages for mental anguish, *Shaw v. United States, supra;* that a severely disabled child may not recover damages for lost earning capacity, *Anderson v. United States*, 731 F.Supp. at 402; that plaintiffs in a wrongful death action may not recover

damages for sorrow, mental anguish, loss of society and companionship and comfort, *Imperial v. United States*, 755 F.Supp. 695, 696-97 (N.D.W.Va. 1990); that a grandparent of a severely disabled child who stands *in loco parentis* may not recover for loss of consortium, *Anderson v. United States*, 731 F.Supp. at 402. The petitioner submits that the government would continue to make similar arguments that a certain element of damages is not recoverable because it is "punitive."

In sum, acceptance of the Seventh Circuit's definition of "punitive damages" would result in the elimination of a consideration of state laws of compensatory damages and thereby thwart the purpose of the Federal Tort Claims Act which is to provide compensation for tort claimants in accordance with state law. Instead of relying on state law, the federal courts would be required to develop an entire body of federal law delineating just exactly what elements of damages are recoverable under the Tort Claims Act and how those damages are to be measured.

II. THE DAMAGES FOR WHICH MR. MOLZOF SOUGHT RECOVERY ARE NOT "PUNITIVE" AND ARE NOT BARRED BY 28 U.S.C. §2674.

A. Robert Molzof Was Entitled To Recover Damages For Future Medical Care.

In arguing that the Seventh Circuit correctly denied any additional damages for future medical expenses, the respondent places great reliance on the determination of the district court that Mrs. Molzof had not sufficiently

established that she intended to transfer Mr. Molzof to a private hospital facility.

There is no authority which states that in order for a veteran to recover future medical expenses in a situation such as this, he or she must conclusively establish that he or she will seek medical care from private facilities in the future, rather than from a Veterans' Administration facility. Rather, the cases which have addressed the issue of whether a veteran, who brings an action under the Federal Tort Claims Act, may be compensated for future medical expenses even though the veteran is entitled to receive free medical care at Veterans' Administration facilities, have all held that the veteran must be given the *opportunity to choose* between private facilities and Veterans' Administration facilities. *Feeley v. United States*, 337 F.2d 924, 934-35 (3rd Cir. 1964); *Ulrich v. Veterans Administration Hospital*, 853 F.2d 1078, 1084 (2nd Cir. 1988); *Powers v. United States*, 589 F.Supp. 1084, 1108 (D.Conn. 1984); *Christopher v. United States*, 237 F.Supp. 787, 798 (E.D.Pa. 1965). Those cases specifically state that the veteran should not be forced to obtain medical care from the tortfeasor who necessitated the care.

In *Feeley v. United States*, the court stated:

> The plaintiff *may not* be satisfied with the public facilities; he *may feel* that a particular private physician is superior; in the future because of overcrowded conditions he *may* not even be able to receive timely care. These are only a few of the many considerations with which an individual may be faced in selecting treatment. The plaintiff's past use of the government facilities does not ensure his future use of

> them. He will now have the funds available to him to enable him to seek private care.

(Emphasis supplied.) 337 F.2d at 935.

Feeley does not state that the veteran must prove that he or she is not satisfied with the government facilities, or that he or she will be able to receive timely care at private facilities, or that he or she will seek private care. Instead, the court in that case indicated that the mere possibility that the veteran may not be satisfied with the public facilities or that he or she will not be able to receive timely care, warrants an award of damages to enable him or her to seek private care, if he or she so desires.

Similarly, in *Christopher v. United States*, 237 F.Supp. at 798, the court indicated that the veteran "has a right to select a private hospital or a physician of his own choosing *should he so desire in the future.*" (Emphasis supplied.) The court did not hold in that case that the veteran must select a private hospital or establish that he or she would select a private hospital, but rather only held that he or she should be given the opportunity to make the selection if he or she wished to do so.

Furthermore, in *Feeley v. United States*, 337 F.2d at 935, and *Ulrich v. Veterans Administration Hospital*, 853 F.2d at 1084, the courts specifically pointed out that it is irrelevant that the veteran has utilized the Veterans' Administration facilities in the past. If the veteran's past practice is irrelevant, so too are his or her future intentions. Regardless of past practice or future intentions, the veteran must be given the opportunity of choosing the type of facilities he or she desires.

Therefore, the factual determinations made by the district court are not determinative of the legal question of whether a veteran in Mr. Molzof's position should be entitled to recover damages for future medical care.

The respondent's assertion that the difference in benefits provided by 38 U.S.C. §351 and 38 U.S.C. §610 provides a sufficient reason for Congress' failure to provide in §610 a set-off of Tort Claims Act damages against future medical benefits, is not valid. Resp. Br. 30-31. Congress could easily have enacted a provision similar to §351 to avoid the potential for a double recovery in a Tort Claims action if the claimant veteran were entitled to recover free future medical care under §610.

B. An Award Of Damages For Loss Of Enjoyment Of Life Is Not Precluded By The Punitive Damage Proscription Of 28 U.S.C. §2674.

Relying solely on *Flannery v. United States*, 718 F.2d 108 (4th Cir. 1983), cert. denied, 467 U.S. 1226 (1984), the respondent asserts that an award of damages for loss of enjoyment of life is not compensatory. However, another circuit court of appeals has characterized such an award as compensatory. In *Rufino v. United States*, 829 F.2d at 362, where damages to a comatose plaintiff for loss of enjoyment of life were held not to be "punitive," the Second Circuit reasoned:

> The purpose of a recovery for loss of enjoyment of life is clearly to compensate for that loss. The fact that the compensation may inure as a practical matter to third parties in a given case does not transform the nature of the damages. Indeed, such a rule, carried to its logical

> conclusion, would render all damages recovered by a decedent's estate punitive in nature.

This reasoning is applicable here. See also: *Flannery v. United States*, 297 S.E.2d 433, 438-39 (W.Va. 1982).

Moreover, since damages to a comatose plaintiff are not based on the egregiousness of the tortfeasor's conduct, but on the extent of the loss, they are not "punitive." Consequently, the question of whether such damages are allowable is a matter of state law. As the *Rufino* case stated:

> Whether loss of normal pursuits and pleasures of life is a separately compensable element of damages, and whether cognitive awareness is a necessary condition to such an award, are questions which — in this case — must be resolved according to the law of New York.

829 F.2d at 359.

In footnote 21 of its brief, the respondent misinterprets Wisconsin law by stating that "Wisconsin does not permit a plaintiff in a survival action to recover damages for the decedent's loss of enjoyment of life, specifically because such an award would violate the basic principle that tort damages are compensatory." Resp. Br. 34. The real reason Wisconsin does not permit a plaintiff in a survival action to recover damages for a decedent's loss of enjoyment of life is that the survival statute, sec. 895.01, Wis. Stats., only permits a survival action to be brought for personal injury damages suffered by the decedent *prior* to his or her death. Loss of enjoyment of life is obviously not a type of damage sustained by a decedent prior to death and that is why it is not

recoverable. This matter is clearly irrelevant to the question of whether Wisconsin would permit a living, though comatose, person to recover damages for loss of enjoyment of life.

CONCLUSION

The petitioner respectfully requests the Court to reverse the judgment of the Seventh Circuit, and to remand this case to the United States District Court for the Western District of Wisconsin for the entry of a judgment in the amount of $1,331,649.03, for the reasonable cost of medical care, and in the additional amount of $60,000, for loss of enjoyment of life.

Respectfully submitted,

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